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United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Ernest C. Reed,

Appellant,

vs.

United States of America, Charles E. Sebastian, Chief of Police of the City of Los Angeles, and Patrick J. Phelan Agent of the State of Iowa,

Appellees.

APPELLANT'S OPENING BRIEF.

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Table of Cases Cited.

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United States of America, Charles E. Sebastian, Chief of Police of the City of Los Angeles, and Patrick J. Phelan Agent of the State of Iowa,

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IN THE MATTER OF THE APPLICATION OF ERNEST C. REED FOR WRIT OF HABEAS CORPUS.

APPELLANT'S OPENING BRIEF.

STATEMENT OF THE CASE.

Ernest C. Reed, appellant herein, applied for a writ of habeas corpus directed to Charles E. Sebastian, as Chief of Police of the City of Los Angeles, State of California, and Patrick J. Phelan, as Agent of the State of Iowa, requiring them to bring the body of the said Ernest C. Reed before the Honorable Benjamin F. Bledsoe, judge of the District Court of the United

States in and for the Southern District of California, Southern Division, at Los Angeles.

The petition for the writ was filed December 17, 1914, and thereupon and on the same date an order was signed by said district judge directing the writ of habeas corpus to issue, and thereafter and on said December 17, 1914, a writ of habeas corpus was issued directed to said Sebastian and said Phelan in their respective official capacities, and was on December 17, 1914, served on said officers by the United States marshal at Los Angeles, and on said day the said Ernest C. Reed was admitted to bail in the sum of five thousand dollars.

Thereafter and on December 18, 1914, the return of said officers to said writ was duly filed with the clerk of said United States District Court.

On December 18, 1914, said Ernest C. Reed appeared, represented by his counsel, Collier, Shelton & Schlegel; the state of Iowa being represented by Percy V. Hammon, deputy district attorney in and for Los Angeles county, California, and C. A. Stutsman, Esq., of counsel.

The said Ernest C. Reed through his counsel then presented the points raised on behalf of said petitioner in paragraph I of said petition, subdivision (a), but was informed by said court that he did not care to hear from counsel thereon but to proceed with the argument on the question of admissibility of evidence to show the bar of the statute of limitations.

Under such admonition counsel then passed to the question of the right and duty of said District Court

to admit evidence for the purpose of showing that the alleged criminal offense, if any there was, was barred by section 5165 of the Annotated Codes of 1897 of the state of Iowa. Counsel stated to the court that he was prepared to show, by witnesses then present in the court room, and by depositions to be taken in Iowa, in the event that the court should rule that testimony was admissible, that the said Ernest C. Reed was for more than three years after the alleged offense was committed, publicly a resident of the state of Iowa; that for more than three years after said alleged offense was committed the said Ernest C. Reed was constantly within the reach of the process of the state of Iowa, both civil and criminal, and for that reason said alleged offense was barred by the statute of limitations. That said evidence did not go to the defense of the matters charged in the indictment set out in said petition. but went entirely to the question of fact, always open to proof—to-wit: was petitioner a fugitive from justice; that if it could be shown that the prosecution was barred by the statute the petitioner was not a fugitive from justice, and the writ of habeas corpus should be granted and the prisoner discharged from custody and his bail exonerated.

After argument by counsel for both petitioner and respondents, the case was submitted to the court for decision, and thereafter and on December 19, 1914, the said Honorable Benjamin F. Bledsoe, as such district judge, denied the application of petitioner to introduce the evidence hereinabove referred to, declined to hear further arguments, discharged the writ of

habeas corpus theretofore issued, and remanded the petitioner to custody.

That thereafter and on said December 19, 1914, leave was duly and regularly granted to petitioner to appeal to the Circuit Court of Appeals of the United States and petitioner was admitted to bail in the sum of seventy-five hundred dollars, which was duly and regularly furnished, and the petitioner is now out on bail.

That thereafter and on said 19th day of December, 1914, the petitioner and appellant duly filed his assignments of error and thereafter duly perfected his appeal.

SPECIFICATIONS OF ERROR.

I.

APPELLANT RESPECTFULLY REPRESENTS TO THE COURT THAT THE SAID DISTRICT COURT ERRED IN THAT IT DID NOT HOLD THAT THE INDICTMENT PRESENTED TO THE GOVERNOR OF THE STATE OF CALIFORNIA DID NOT PROPERLY AND LEGALLY CHARGE THE PRISONER WITH A CRIME AGAINST THE LAWS OF THE STATE OF IOWA.

In this connection the appellant begs leave to submit the following sub-specifications as to the insufficiency of said indictment:

(a) That said indictment upon which the writ of rendition is based, and a true copy whereof is set forth on pages 15 *et seq.* of the Transcript of Record, purporting to have been filed in the District Court of the county of Scott, state of Iowa, on September 25, 1914,

is wholly insufficient as an indictment in the following partculars, to-wit:

(1) That it does not state facts sufficient to constitute a public offense or a crime or to charge the said Ernest C. Reed with any crime or public offense.

Section 2, clause 2, Article IV of the Constitution of the United States declares: "That a person *charged* in any state with treason, felony or *any other crime* * * *"

Obviously, then, the prisoner must be charged with some crime, and therefore it is necessary that all of the elements of any one crime sought to be charged must be present.

Justice Moody, in the case of Pierce v. Creecy, 210 U. S. 387, says:

> "The Constitution provides that: 'A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime' (Art. 4, Section 2, Clause 2). No person may be lawfully removed from one state to another by virtue of this provision unless: 1, he is charged in one state with treason, felony or other crime; 2, he has fled from justice; 3, a demand is made for his delivery to the state wherein he is charged with crime. If either of these conditions is absent the Constitution affords no warrant for a restraint of the liberty of any person. Here the only condition which it is insisted is absent is the charge of a crime. THE

ONLY EVIDENCE OF A CHARGE OF CRIME IS THE INDICTMENT, AND THE CONTENTION TO BE EXAMINED IS THAT THE INDICTMENT IS INSUFFICIENT PROOF THAT A CHARGE HAS BEEN MADE."

"The only safe rule is to abandon entirely the standard to which the indictment must conform judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact, however inartificially, CHARGED WITH CRIME IN THE STATE FROM WHICH HE HAS FLED."

And in commenting on the indictment before him in that case, says:

"The indictment, whether good or bad, as a pleading, UNMISTAKABLY DESCRIBES EVERY ELEMENT OF THE CRIME OF FALSE SWEARING AS IT IS DEFINED IN THE TEXAS PENAL CODE, ETC."

which is but another way of stating that *every element* of a crime must in some manner, though inartificially, be stated or charged in the indictment or affidavit.

And the court in the case of United States v. Reddin, 193 Fed. 798, 802, says:

"In these proceedings (removal for trial, which to all intents and purposes is the same as extradition) all technical considerations are to be avoided as far as possible. McNichols v. Pease, 207 U. S. 100. One highly technical and narrow rule is found necessary which is that the *indictment cannot be attacked as a pleading* BUT MAY BE AS A PIECE OF EVIDENCE; that is, abandon entirely the standard fixed by courts as a test of criminal proceedings AND INQUIRE ONLY WHETHER

IT SHOWS SATISFACTORILY IF THE ACCUSED HAS BEEN IN FACT, HOWEVER INARTIFICIALLY, CHARGED WITH A CRIME."

Treated, then, in the language of the last case above cited, as evidence of the charge of the crime, can it be said that there was sufficient evidence before either governor for any court to charge the defendant with a crime. Attention in this matter is particularly called to State v. Loser, 132 Iowa 419, *infra*.

The indictment in the instant case evidently attempts to charge the crime of cheating by false pretenses [see Transcript, page 15]. If not that, then with what crime is it attempting to charge petitioner? Unless *all the elements* of cheating by false pretenses or any other crime are present, then no crime whatever has been sufficiently charged in the indictment, and therefore it is barred even within the view of Pierce v. Creecy, *supra*.

In State v. Loser, 132 Iowa 419, 104 N. W. 337, 339, the court says:

> "But in view of the allegations of the indictment and the charges given by the court, it was important that the crime of larceny and of cheating by false pretenses be clearly distinguished. That there is a distinction between the two is apparent, although they are in some respects similar in character. The distinction is this: If the false pretenses induce the owner to part with his property INTENDING TO TRANSFER BOTH TITLE AND POSSESSION, the crime is *cheating by false pretenses*. If, on the other hand, one by fraud, trick

or false pretenses, INDUCES THE OWNER TO PART MERELY WITH THE POSSESSION OF HIS PROPERTY, THERE BEING NO INTENT TO PASS THE TITLE, and the party who receives it took it with intent fraudulently to convert it to his own use, *the crime is larceny.* * * * Having charged as already indicated the trial court undertook to define the crime of cheating by false pretenses, and, among other things, said that to make out the conspiracy it should be shown that the means to be used were such as had they been successful the defendants would have been guilty of cheating by false pretenses. It further charged that, if the false pretenses were such as to induce the prosecutors to endorse and turn over to the defendants the absolute possession and apparent ownership of certain drafts in order to settle an assumed controversy, this would make out the crime of cheating by false pretenses, and it would make no difference in this respect even should it appear from the evidence that when the prosecutors parted with their drafts they did not intend to part with the title to their property. In other instructions the court defined larceny and said that if the defendant conspired to obtain the property through larceny, the defendant would not be guilty. Larceny was properly defined in these instructions, but in the one to which we have referred, the crime of cheating by false pretenses was not described. IT IS NOT THE OBTAINING OF THE APPARENT TITLE WHICH CONSTITUTES THE CRIME, FOR POSSESSION OF AN ENDORSED DRAFT ALONE GIVES AN APPARENT TITLE, NO MATTER HOW THAT POSSESSION BE OBTAINED. IF THE PROSECUTORS DID NOT INTEND TO PART WITH THE TITLE, BUT DELIVERED THE POSSESSION

FOR TEMPORARY PURPOSE, AND DEFENDANTS TOOK AND FRAUDULENTLY CONVERTED IT, THEY WERE GUILTY OF LARCENY AND NOT OF THE CRIME OF CHEATING BY FALSE PRETENSES. * * * The fifth instruction asked by the defendant, which read in this wise, should have been given, 'If these defendants conspired to induce Gregory and Barker to part with the *possession* of the things described in the indictment, or some or all of them, *without purpose* on the part of Gregory and Barker *to part with the property in said things,* and expecting their return, and the conspiracy includes a felonious intent to deprive the owners of the goods; or if it wa sthe purpose of the conspiracy to *obtain the possession only by a trick,* artifice or false pretense, with felonious intent to convert what was obtained to their own use, that would be a conspiracy to commit larceny, and if you find that such was the conspiracy, *you must acquit the defendant,'* and we think that the seventh, reading as follows, should also have been given, 'should you find that the defendant conspired to induce Gregory and Barker to bet on a foot race, and to that end to place the things described in the indictment, or some of them, in the hands of the stakeholder, you are instructed that this *would not be a conspiracy to obtain title to the property,* and if you find that such was the conspiracy, *you must acquit the defendant.'*

"Sixth: We hardly deem it necessary to say that one indicted for conspiracy to cheat by false pretenses may not on that charge be convicted of a conspiracy to commit larceny."

In view of the foregoing, which is a recent decision, to-wit: 1905, of the Supreme Court of the *state of Iowa,* the state from which it is alleged petitioner fled, and *according to whose laws the crime must be charged,* one of the essential elements of false pretenses is that there must have been an intent on the part of the party defrauded to part with the title to his property, or else there is no crime of cheating by false pretenses charged.

On the other hand, unless the charge of crime includes the element of intent to deprive the party defrauded of possession merely, with no intent on his part to deprive himself of the title ,then the crime of larceny has not been charged.

If neither cheating by false pretenses or larceny has been charged, *then what crime has been charged?* Certainly the indictment in question intended to charge either the crime of larceny or the crime of cheating by false pretenses. Manifestly from the face of the indictment itself it is intended to charge the crime of cheating by false pretenses [see Transcript, page 15]. The indictment will be searched in vain for any statement that Asaph Sargent intended to part with the title to his said property. It is impossible to tell from the indictment whether it is intended to charge that Sargent deposited with Reed a draft and stock mentioned in the indictment for a temporary purpose, or whether he intended to part with the title thereto. As said in State v. Loser, *supra:*

> "It is not the obtaining of the *apparent title* which constitutes the crime, for possession of an

> endorsed draft alone gives an apparent title, no matter how that possession be obtained. If the prosecutors did not intend to part with the title, but delivered the possession for temporary purposes, and the defendants took and fraudulently diverted it, they were guilty of larceny and not of the crime of cheating by false pretenses."

Therefore, the recital of the delivery by Sargent of a draft endorsed by him and of stock endorsed by him without any further statement that it was his intention then and there to part with the title thereto, or a statement that he merely delivered them for a temporary purpose, is entirely insufficient and fails to state an important element of either crime, therefore neither the crime of larceny, cheating by false pretenses or any other crime has been CHARGED, and the indictment on which the writ of rendition is based is absolutely void.

FURTHER, THE INDICTMENT DOES NOT CHARGE A PUBLIC OFFENSE, FOR THE REASON THAT IT DOES NOT SHOW THAT ANY PERSON HAS BEEN DEFRAUDED.

In State v. Clark, 26 Pac. 481, the court says:

> "To constitute the offense charged in the information (obtaining money under false pretenses) * * * four elements must concur, which should be averred and proved: (1) There must be an intent to defraud; (2) there must be an actual fraud committed; (3) false pretenses must have been used for the purpose of perpetrating the fraud; and (4) the fraud must be accomplished by means of the false pretenses made use of for the purpose, viz., they must be the

> cause, in whole or in part, which induced the owner to part with his property. * * * The language of the court in the case of People v. Wakely, 62 Mich. 297, is: 'But it does not amount in law to a false pretense unless made with a fraudulent intent, *and the person parting with the property is actually defrauded.*' Was the Stock Yards Bank actually defrauded? What right was it deprived of in the business transaction? * * * If it was not defrauded, *this essential ingredient of the crime charged is lacking,* AND UNLESS EVIDENCE CAN BE PRODUCED TO SHOW THAT THE bank was actually defrauded, the defendant should be discharged."

Applying the above statement of the law to a case similar to the one at bar, we find in Graves v. State, 19 S. W. 895 (which, by the way, is a Texas case, and therefore is competent authority on the question whether Sargent in the instant case was defrauded), the following language:

> "Appellant was indicted for the offense of swindling, was convicted, and his punishment assessed at two years' confinement in the penitentiary, on which judgment sentence was rendered and he appeals. The indictment charges the defendant with having obtained from W. C. Reeves money, mules, a wagon and other personal property aggregating $295.00 in *exchange for a tract of land which he then and there represented to said Reeves to be free from encumbrance, but in truth and in fact there was an enucumbrance on said land, which had been given by defendant to one G. S. Dickerson,* defendant's vendor; that the

said incumbrance was a written instrument in words and figures as follows (here follows a copy of the instrument) * * *. The only question is, is the indictment sufficient? Whether the note set out in the indictment is a lien on the land in the hands of the purchaser Reeves necessarily depends upon the recitals in the deed from Dickerson to defendant. Of itself, though retaining a vendor's lien, the note cannot constitute a lien UNLESS THE PROSECUTOR HAD NOTICE OF THE NOTE AND ITS RECITALS BEFORE HE PURCHASED, BUT THIS CANNOT BE, BECAUSE THE INDICTMENT ALLEGES THAT THE PROSECUTOR PURCHASED THE LAND WITHOUT NOTICE, AND WITHOUT NOTICE OF THE EXISTENCE OF THE VENDOR'S LIEN NOTE, AND PAID DEFENDANT FOR THE LAND. Unless the deed of defendant from his vendor Dickerson retains a lien or recites the fact that the land is still unpaid for, the purchaser occupies the Gibraltar of defenses, 'an innocent purchaser without notice.' If, however, the lien is reserved in the deed, and the purchaser is bound by the recitals in his chain of title, or if he is bound by the record of the deed, from which the law will presume notice, THESE FACTS SHOULD HAVE BEEN ALLEGED IN THE INDICTMENT. MERELY TO STATE THAT A NOTE WHICH IS SET OUT IN THE INDICTMENT IS A LIEN ON THE LAND IS BUT AN INFERENCE OF THE PLEADER NOT SUSTAINED BUT REBUTTED BY THE FACTS PLEADED BY HIM. IT IS NOT A MERE QUESTION OF EVIDENCE. THE DEED AND THE NOTE ARE PARTS OF THE SAME TRANSACTION, CONSTITUTING A LIEN ON THE LAND IN THE HANDS OF THE PROSECUTING WITNESS W. C. REEVES WE THEREFORE

HOLD THAT THE INDICTMENT IS INSUFFICIENT TO SUSTAIN THE CONVICTION, AND THE JUDGMENT IS REVERSED."

The indictment in the instant case nowhere makes a statement of any kind that Sargent was defrauded in any manner. It does not state anywhere that he ever received the property in question or that there was any other consideration moving from Reed to him, and so far as the indictment is concerned there is nothing to show that the alleged statements claimed to have been made by Reed were anything more than mere idle statements. It is not shown that Sargent gave any of the property mentioned to Reed for any purpose whatsoever, nor how or in what manner the alleged representations of Reed were the basis upon which he parted with his property. And in this connection the language used by the court in State v. Barbee, 37 S. W. 1119, 1120, is in point, to-wit:

"Furthermore, it is well settled law, both in this state and elsewhere, that it is not every false pretense which can be made a basis of a criminal prosecution. It must be such a one as is calculated to deceive. Now, in this case we know (because the indictment does not charge it) that defendant did not represent to Kern that Watson was solvent. TAKING THIS AS TRUE, IT IS UTTERLY INCONCEIVABLE THAT KERN COULD HAVE BEEN INDUCED AND DECEIVED IN PARTING WITH THE MONEY OF THE BANK ON THE MERE NAKED AND UNSUPPORTED ASSERTION OF DEFENDANT THAT HE WAS THE OWNER OF A NOTE ON WATSON FOR AN UNCERTAIN AMOUNT AND DUE AND PAYABLE AT

A DAY UNCERTAIN. SUCH REPRESENTATIONS MADE UNDER SUCH CIRCUMSTANCES ARE CALCULATED TO DECEIVE NO ONE, AND THEREFORE, IF MADE, CONSTITUTE NO CRIME. * * * Moreover, it must be celar that even if defendant had represented to Kern that Watson was solvent, etc., and such representations were false and made with intent to defraud, STILL NO CRIME WAS COMMITTED UNLESS THE INDICTMENT SHOWS, AND SPECIFICALLY SETS FORTH, THAT SOMETHING ELSE WAS DONE BY THE DEFENDANT IN ADDITION TO AND AFTER MAKING THE FALSE PRETENSES. This the indictment does not do, because it does not appear therefrom that the overdrafts were drawn by the defendant after the false pretense was made. * * * But if the overdrafts were made prior to making the false pretenses, and the payments made after that,—if this is the correct view of the matter,—THEN ON THE FACE OF THE INDICTMENT NO CRIME IS CHARGED, BECAUSE FROM THE INDICTMENT IT DOES NOT APPEAR HOW THIS WAS, AND IT IS THE DUTY OF THE PLEADER IN DRAFTING AN INDICTMENT TO DISTINCTLY CHARGE THE FACTS WHICH CONSTITUTE THE CRIME."

The intention of the court is called to the fact that it nowhere appears that the premises were deeded to Asaph Sargent, and if they were not deeded to Asaph Sargent, then, even granting, for the sake of the argument only, that the representations were made as alleged in the indictment that the land was clear, and that Reed was the owner of it, and granting, likewise for the sake of the argument only, that those representations were false, that Reed was not the owner of

the land, and furthermore that it was encumbered by a vendor's lien in the sum of two thousand five hundred dollars, how, under those circumstances, could Sargent be in any manner defrauded? What was it to him whether Reed owned the land or he didn't own the land, and what was it to him whether the land was encumbered by $2500.00 vendor's lien or by a $10,000.00 vendor's lien? Or, as the court quotes approvingly in the case of State v. Barbee, *supra:*

> "It has been ruled that 'a sale of goods induced by the buyer's false representations that he had in his office a certain quantity of property liable to his debts as a means of obtaining credit, will not warrant an indictment. Common prudence would require the prosecutor to resort to other information.' "

If, therefore, the alleged representations of Reed were made for the purpose of inducing Sargent to buy the land, then the indictment does not charge a crime within the meaning of the federal statutes, because that fact is not stated. If the alleged representations were made for the purpose of obtaining credit, then, in the language of State v. Barbee, just quoted, such statements "will not warrant an indictment. Common prudence would require the prosecutor to resort to other information." And how can this, or any other court, state that a crime was charged, unless it can be shown from the only evidence before the court, to-wit, the indictment, or any of the papers or documents used in the extradition proceedings, before the governor of Iowa or of California, that such a false representation

was made as is in law sufficient to warrant an indictment?

Therefore, again we say that no crime has been charged against the appellant herein either as required by the laws of the state of Iowa or elsewhere.

II.

That the Said District Court Erred in Excluding the Testimony Offered by Petitioner for the Purpose of Showing That Petitioner Was Publicly a Resident Within the State of Iowa for More Than Three Years After the Alleged Commission of the Alleged Crime Set Forth in the Indictment, and Was for More Than Three Years After the Alleged Commission of Said Offense Not Without the Reach of Criminal Process of the State of Iowa, and Is Therefore Not a Fugitive from Justice.

The indictment in question is set forth on pages 15, 16 and 17 of the Transcript of Record.

It will be noticed therefrom that the alleged offense was committed June 7, 1909, whereas the indictment was not filed until September 25, 1914, or five years, three months and eighteen days after the alleged commission of the offense.

The following are the sections of the Annotated Codes of 1897 of the state of Iowa upon the question of the statute of limitations:

Section 5163:

"A prosecution for murder may be commenced at any time after the death of the person killed."

Section 5164:

"An indictment for a public offense may be found within eighteen months after its commission in the following cases, and not after: 1. Taking or enticing away an unmarried female under the age of consent, for the purpose of marriage or prostitution. 2. Seducing or debauching an unmarried female of previously chaste character. 3. For rape or adultery. 4. For an assault with intent to commit a rape."

Section 5165:

"In all other cases an indictment for a public offense must be found within three years after the commission thereof, and not afterwards."

Section 5167:

"If, when the offense is committed, the defendant is out of the state, the indictment or prosecution may be found or commenced within the time herein limited after his coming into the state, and no period during which the party charged was not publicly a resident within the state is a part of the limitation."

That the petitioner had the undoubted right to introduce evidence in this matter showing that the alleged crime was barred by the statute of limitations of the state of Iowa for the purpose thereby of showing that he was not a fugitive from justice, is, we believe, clearly set forth and decided in the case of Bruce

v. Rayner, 124 Fed. 481, and as this case is nearly on all fours with the case at bar we shall take the liberty of making an extended quotation therefrom:

> "This case comes up on appeal from the Circuit Court of the United States for the District of Maryland. Thomas Bruce, the appellant, being in the custody of an agent of the state of New Jersey under the warrant of the governor of Maryland, applied on January 2, 1903, to the Circuit Court of the United States for a writ of habeas corpus. His petition set forth his arrest and alleged unlawful detention under a warrant issued by the governor of Maryland in response to a requisition of the governor of New Jersey, and proceeds as follows: 'Third: Your petitioner is advised and believes and charges that the said requisition is based upon an indictment alleged to have been found by the grand jury in and for the county of Essex, in the state of New Jersey, which indictment your petitioner charges as defective, illegal, null and void, and without reasonable or adequate foundation in law or in fact, and without probable cause; and your petitioner charges that said indictment does not show that any crime has been committed by him under the laws of the state of New Jersey, although professing so to charge him with the crime of bigamy.'
>
> "The writ of habeas corpus having been issued, the body of the prisoner was produced and a return made to the writ. This return avers that the prisoner, Thomas Bruce, is lawfully in custody by virtue of a warrant issued to the agent of the state of New Jersey by the governor of the state of Maryland upon the request of the governor of New Jersey, on the ground that said Thomas

Bruce is within the state of Maryland as a fugitive from justice of the state of New Jersey under an indictment charging him with bigamy, a crime committed by him within the state of New Jersey against the laws of New Jersey; the papers accompanying the demand by the said governor of New Jersey being certified as authentic by him. To his return the petitioner, Thomas Bruce, replied that he was not lawfully in custody, has not been properly indicted for any offense against the laws of New Jersey, and especially and particularly of the crime of bigamy, and also denying that he is a fugitive from justice in the said state. Hearing the return the court discharged the writ and remanded the prisoner into custody. Leave to appeal was granted and the cause is here on eight assignments of error. The first six of these allege for error that the court did not hold the indictment presented by the governor of Maryland did not properly and legally charge the petitioner with a crime against the laws of New Jersey. The seventh and eighth assignments of error charge errors in the court in excluding testimony offered by the petitioner for the purpose of showing that within the two years succeeding March 11, 1897, the date charged in the indictment as the date of the alleged offense, the petitioner was a resident of the state of New Jersey, and, except at intervals when absent on business, was not without the reach of criminal process in said state, and, further, that the petitioner was a resident of the state of New Jersey, living there except at intervals when absent on account of business, prior to said alleged offense until about December 1, 1890. The warrant of the governor of Maryland does

not show whether he considered any evidence bearing upon the question, was the petitioner, Thomas Bruce, a fugitive from justice, or whether he considered the sufficiency of the indictment. When the cause was heard in the Circuit Court no testimony was received upon the question, was the petitioner a fugitive from justice. Apparently the court did not go behind the warrant of the governor of Maryland."

The foregoing is the statement of facts as delivered by Simonton, circuit judge, who, after such statement of facts, then proceeded to give the decision, from which we quote as follows (the emphasizing is our own):

"Was this error on the part of the court? Section 2, Clause 2, Article IV of the Constitution of the United States declares: 'That the person charged in any state with treason, felony or any other crime who shall flee from justice and be found in another state, shall, on the demand of the executive of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.'

"Provision for executing the mandate of the Constitution is made in sections 5278-5279, Revised Statutes of the United States. Whenever, however, a person charged with being a fugitive from justice is arrested under a warrant of the governor of the state for delivery to the authorities of the demanding state, *he is entitled to invoke the judgment of the judicial tribunals, either federal or state, by writ of habeas corpus, upon the lawfulness of his arrest and imprisonment.*

Roberts v. Riley, 116 U. S. 94; Robb v. Connolly, 111 U. S. 624; *Ex parte* Hart, 63 Fed. 249. When a demand of this character is made on a governor of a state two questions are presented to him: First, is the person demanded substantially charged with a crime against the laws of the state from whose justice it is alleged that he has fled by an indictment or affidavit properly certified? *Second, is he a fugitive from justice from the state demanding him?*

"The first is a question of law, and as such always open to judicial inquiry on the face of the papers on application for discharge under a writ of habeas corpus. Roberts v. Riley, *supra.* The second is a question of fact, and the issuance of a writ of remand by the governor is *prima facie* and presumptively conclusive of this fact, whether he makes an express finding thereon or not. Roberts v. Riley, *supra.* In this case it is said: 'How far the decision of the governor on this question of fact may be reviewed judicially in proceedings in habeas corpus, or whether it is not conclusive, are questions not settled by harmonious judicial decisions nor by any authoritative judgment of the Supreme Court of the United States.'

(Note: This question has, since this decision was written, been settled by McNichols v. Pease, *infra.*)

"But the learned judge delivering the opinion treats the conclusion of the governor as *prima facie* and presumptively correct *only until such presumption is overthrown by contrary proof.* To the same effect is *Ex parte* Reggel, 114 U. S. 653. *Both of these cases go into an examination of the facts* and coincide in the conclusion of the gov-

ernor. A fugitive from justice is one who, having committed a crime within a state, *either conceals himself within the state or departs therefrom so that he cannot be reached by ordinary process.* Therefore, in determining whether he be delivered on the demand in which he is charged with crime, it must appear not only that he was properly indicted, *it must also appear that he was within the state when the crime charged was committed, and also that he had concealed himself or had absconded so that he could not be reached by ordinary process. Ex parte* Reggel, 114 U. S. 651. *So it would seem that this question of fact is always open to inquiry.* The mere requisition of the governor of the demanding state can not be accepted as conclusive of the fact, ELSE THE ACCUSED PERSON MAY BE REMANDED NOTWITHSTANDING THE INCONTESTABLE PROOF THAT HE HAD NEVER BEEN WITHIN THE STATE WHOSE EXECUTIVE IS DEMANDING HIM. *Ex parte* Reggel, 114 U. S. 652. IT IS CLEAR, THEREFORE, THAT THIS FACT IS OPEN TO FROOF AND EXAMINATION. Hyatt v. New York, 23 Sup. Ct. 456. *And if one fact which constitutes the term 'fugitive from justice' can be inquired into, why should not the other facts equally necessary be also inquired into?* * * * As is said in Hyatt v. New York, *supra,* 'If upon a question of fact made before the governor which he ought to decide, there were evidence pro and con, the court might not be justified in reversing the decision of the governor upon the question. In a case like that, where there was some evidence sustaining the finding, the courts *might* regard the decision of the governor as conclusive.' *In the case at bar* (as in the instant

case) *the record* does not disclose whether any evidence was offered before the governor of Maryland (or California) or whether he acted solely on the requisition. In the case of *In re Cook* (C. C.), 49 Fed. 841, Jenkins, J., speaking for the Circuit Court of Appeals, said: 'It is essential to compliance with such executive demand that the person whose surrender is demanded be adjudged a fugitive fro mjustice of the demanding state. *The decision of the executive is not conclusive of that fact,* and so *we are of the opinion that the action of the executive is reviewable by federal tribunals, and it is competent for the court to determine whether in fact the demanded person is a fugitive from justice.'* * * * An important question in this connection is what kind of testimony can be admitted. * * * (Here follows a copy of the indictment.)

"It is stated in the petition of Thomas Bruce that he was living in New Jersey anterior to and at the time of the commission of the crime charged in the indictment, and that he continued to live in the state of New Jersey, occasional absences for business excepted, up to December, 1900. DOES THIS ALLEGATION GO TO THE SUFFICIENCY OF THE INDICTMENT? IS IT A MATTER OF DEFENSE OR IS IT AN ALLEGATION BEARING UPON THE QUESTION IS HE A FUGITIVE FROM JUSTICE? * * * A statute of the same state of New Jersey (General Stat., page 1145, section 130) declares as follows: 'Nor shall any person be prosecuted, tried or punished for any offense not punishable by death (of which bigamy is one), unless the indictment shall be found within two years from the time of committing the offense. * * * Pro-

vided, further, that nothing herein contained shall extend to any person fleeing from justice.' The indictment in this case, as we have seen, was found September term, 1902, and charges bigamous marriage of the petitioner as of the 11th of March, 1897. It thus appears that in order to prosecute, try or punish one charged with bigamy in New Jersey, it must appear that he or she having a wife or husband living has been guilty of the act of marriage to another person within two years of the finding of the indictment, and that unless such indictment is so brought within said two years the prosecution will not lie unless the person accused is a fugitive from justice. Now, we have seen that to make one a fugitive from justice it must appear, first, that he was within the state when the crime charged is alleged to have been committed; second, THAT BEING AMENABLE TO CRIMINAL PROCESS, EITHER CONCEALS HIMSELF OR AVOIDED IT SO THAT IT COULD NOT BE SERVED, OR THAT HE DEPARTED THE STATE AND SO AVOIDED SERVICE. IF, THEREFORE, IT COULD BE SHOWN THAT HE DID NOT CONCEAL HIMSELF WITHIN THE STATE DURING THE PERIOD WHICH HE WAS AMENABLE TO CRIMINAL PROCESS, THIS WOULD BE EVIDENCE TENDING TO ESTABLISH THE FACT THAT HE WAS NOT FUGITIVE FROM JUSTICE. *This testimony would not go to the sufficiency of the indictment or to any manner of defense. It would be directed solely to the question whether he was a fugitive from justice on question of fact.* The court, as has been seen, can inquire whether the accused was within the state at the date of the alleged crime, and, pursuing its inquiry, it can ascertain if, being within the state at that time,

he remained within reach of criminal process during the whole period for which such process would run. IF THIS BE ESTABLISHED, THEN IT COULD REASONABLY BE CONCLUDED THAT HE IS NOT A FUGITIVE FROM JUSTICE AND SO NOT WITHIN THE PROVISIONS OF THE CONSTITUTION OR THE ACT OF CONGRESS. IT IS NOT A QUESTION OF PLEADING PRESENTED TO THE COURT ON THE TRIAL OF THE ACCUSED, AS IN UNITED STATES v. COOK, 17 Wall. 168, BUT A QUESTION OF FACT TO BE DISPOSED OF BEFORE REMANDING THE ACCUSED TO THE DEMANDING STATE. (Note: The same remarks apply to Pierce v. Creecy, 210 U. S. 387, where no offer of testimony was made, the attack being directed solely to the pleading.) HE CANNOT BE REMANDED UNLESS HE BE A FUGITIVE FROM JUSTICE.

"To sum up, we are of the opinion that the Circuit Court hearing the case on the petition, return and replication in habeas corpus, could judicially inquire into the sufficiency of the indictment under which the petitioner was demanded (*Ex parte* Hart, 63 Fed. 249); *that it could also judicially inquire into the facts bearing upon the question whether the petitioner was or was not a fugitive from justice, and that the court erred in not permitting testimony to be introduced touching this question.* IT IS ORDERED THAT THE CAUSE BE REMANDED TO THE CIRCUIT COURT WITH INSTRUCTIONS TO RECEIVE SUCH TESTIMONY AS WILL PROPERLY BEAR UPON THE QUESTION WHETHER OR NOT THE PETITIONER IN THIS CASE WAS A FUGITIVE FROM JUSTICE."

It seems to us that the facts in the case at bar and in the case of Bruce v. Rayner are almost identical.

The instant case comes up from the District Court of the United States, Southern District of California, and the objections are based upon the same grounds as in the case of Bruce v. Raynor, to-wit:

1. That the indictment does not charge a crime and is therefore illegal, null and void, and without reasonable or adequate foundation in law or in fact, or probable cause; and,

2. That the court erred in excluding testimony offered by the petitioner for the purpose of showing that for the statutory period succeeding the offense the petitioner was a resident of the demanding state and was not without the reach of crimnial process in said state, for the petition distinctly shows [see page 6 of Transcript] "that the said Ernest C. Reed was for more than three years (being the statutory period) following the commission of said alleged offense set forth in said indictment, publicly a resident within the state of Iowa."

And the petition further avers [see page 6 of Transcript of Record] "that said requisition and said executive warrant issued by the governor of the state of California should not have been issued, for the reason that the said Ernest C. Reed is not now and was not at the time said requisition and the said governor's warrant were issued, nor at the time of finding said indictment, a fugitive from justice under section 5278 of the United States Revised Statutes."

And further, if we use the language of the Bruce-Rayner case, merely substituting names, the substitu-

tions being in italics, we would then find the following language as appears on page 483 thereof, to-wit:

> "In the case at bar the record does not disclose whether any evidence was offered before the governor of *California,* or whether he acted solely on the requisition."

And quoting further from page 485, with the same change of names, etc., the language would then be as follows:

> "It is stated in the petition of *Ernest C. Reed* that he was living in *Iowa* * * * at the time of the commission of the crime charged in the indictment, and that he continued to live in the state of *Iowa for more than three years thereafter.* * * * A statute of the same state of *Iowa* (*Annotated Code of Iowa, 1897, section 5163*), *'A prosecution for murder may be commenced at any time after the death of the person killed.' Section 5164. 'An indictment for a public offense may be found within eighteen months after its commission in the following cases, and not after: 1, taking or enticing away an unmarried female under the age of consent, for the purpose of marriage or prostitution; 2, seducing or debauching an unmarried female of previously chaste character; 3, for rape or adultery; 4, for an assault with intent to commit a rape. Section 5165. In all other cases an indictment for a public offense must be found within three years after the commission thereof, and not afterwards. Section 5167. If, when the offense is committed, the defendant is out of the state, the indictment or prosecution may be found or commenced within the time herein limited after his coming into the state*

and no period during which the party charged was not publicly a resident within the state is a part of the limitation. The indictment in this case, as we have seen, was found *September 25, 1914,* and charges crime of false pretenses on *June 7, 1909.* It thus appears that in order to prosecute, try or punish one charged with *cheating by false pretenses in Iowa* it must appear that he or she has been guilty of the crime and that unless such indictment is so brought within said period of *three years* the prosecution will not lie, unless the person *be not publicly a resident of the state* for that length of time after the commission of the offense. * * * If, therefore, it could be shown that he did not conceal himself within the state during the period which he was amenable to criminal process, this would be evidence tending to establish the fact that he was not a fugitive from justice."

And why should a mere statement in the indictment itself [Transcript page 17] that "said Grand Jury further alleges that said Ernest C. Reed has not been publicly a resident within the state of Iowa during the period of time from June 7, 1909, until the present time, the date of the return of this indictment," be any more conclusive than a statement by the Honorable Hiram W. Johnson, Governor of California, appearing on page 8 of said Transcript, to-wit: "and it satisfactorily appearing that the representations of the Governor of Iowa are true and that the said Ernest C. Reed is a fugitive from the justice of the said state of Iowa," or the statement of the Governor of Iowa

as contained on page 11 of said Transcript, "that he (Ernest C. Reed) has fled from this state and is a fugitive from the justice thereof." Especially is this true when the Circuit Court of Appeal has said in the Bruce-Rayner case, on page 483:

> "Therefore, in determining whether he be delivered on demand of the state in which he is charged with crime, it must appear not only that he was properly indicted; it must also appear that he was within the state at the time the crime charged was committed and also that he has concealed himself or had absconded so that he could not be reached by ordinary process. So it would seem that the question of fact is always open to inquiry. THE MERE REQUISITION OF THE GOVERNOR OF THE DEMANDING STATE CANNOT BE ACCEPTED AS CONCLUSIVE OF THE FACT, ELSE THE ACCUSED PERSON MAY BE REMANDED, NOTWITHSTANDING INCONTESTABLE PROOF THAT HE HAD NEVER BEEN WITHIN THE STATE WHOSE EXECUTIVE IS DEMANDING HIM."

And the above conclusion, to-wit, that the governor's warrant or demand is not conclusive, has been decided by the state of Iowa itself in Jones v. Leonard, 50 Iowa 106, 110, in which the court says:

> "The governor of this state is not clothed with judicial powers and there is no provision of the Constitution or laws of the United States or of this state which provides that his determination is final and conclusive, in the case of an extradition of a citizen. In the absence of such a provision we hold that the decision of the governor only makes a *prima facie* case. That it is competent

for courts in a proceeding of this character (habeas corpus) to inquire into the correctness of his decision and discharge the prisoner."

The whole question seems to turn upon the question as to whether or not a man had departed from the state so as not to be amenable to its criminal process. If he remained within the state for such a period of time that action on the alleged offense becomes barred, then he could not lawfully be amenable to the process of the court of that state, and therefore if he departs from that state afterwards, he certainly is not a fugitive from justice. For to be a fugitive from justice he must be in the position of being amenable to a state's criminal process lawfully issued and lawfully to be executed, and the following language from the case of Hyatt v. New York etc., 188 U. S. 713, is quite in point:

> "In other words, the appellant was entitled under the Acts of Congress to insist upon proof that he was within the demanding state at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction *so that he could not be reached by her criminal process.* The statute, it is to be observed, does not prescribe the character of such proof but that the executive authority of the territory was not required by the Act of Congress, to cause the arrest of appellant, and his delivery to the agent appointed by the Governor of Pennsylvania, *without proof of* THE FACT *that he was a fugitive from justice,* is, in our judgment, clear from the language of that act. Any other interpretation would

lead to the conclusion that the mere requisition by the executive of the demanding state, accompanied by the copy of the indictment, or an affidavit before a magistrate, certified by him to be authentic, charging the accused with crime committed within her limits, imposes upon the executive of the state or territory where the accused is found, the duty of surrendering him, ALTHOUGH HE MAY BE SATISFIED, FROM INCONTESTABLE PROOF, THAT THE ACCUSED HAD IN FACT NEVER BEEN IN THE DEMANDING STATE AND THEREFORE COULD NOT BE SAID TO HAVE FLED FROM ITS JUSTICE. UPON THE EXECUTIVE OF THE STATE IN WHICH THE ACCUSED IS FOUND RESTS THE RESPONSIBILITY OF DETERMINING IN SOME LEGAL MODE WHETHER HE IS A FUGITIVE FROM JUSTICE OF THE DEMANDING STATE. HE DOES NOT FAIL IN DUTY IF HE MAKES IT A CONDITION PRECEDENT TO THE SURRENDER OF THE ACCUSED THAT IT BE SHOWN TO HIM, BY COMPETENT PROOF, THAT THE ACCUSED IS IN FACT A FUGITIVE FROM JUSTICE OF THE DEMANDING STATE."

In the case of McNichols v. Pease, 207 U. S. 109, the Supreme Court of the United States lays down the rules which govern extradition and the application of *habeas corpus* to extradition, and on page 109 uses the following language:

"4. Whether the alleged criminal is or not such fugitive from justice may, so far as the Constitution and the laws of the United States are concerned, be determined by the executive upon whom the demand is made in such a way as he deems satisfactory and is not obliged to demand

a proof apart from proper extradition papers from the demanding state, that the accused is a fugitive from justice.

5. If it be determined that the alleged criminal is a fugitive from justice, whether such determination is based upon the requisition and the accompanying papers in proper form, or after an original independent inquiry into the facts, and if a warrant of arrest is issued after such determination, the warrant will be regarded as making a *prima facie* case in favor of the demanding state and as requiring the removal of the alleged criminal to the state in which he stands charged with crime, UNLESS IN SOME APPROPRIATE PROCEEDING IT IS MADE TO APPEAR THAT HE IS NOT A FUGITIVE FROM JUSTICE OF THE DEMANDING STATE.

5. *A proceeding by habeas corpus* in a court of competent jurisdiction IS APPROPRIATE for determining whether the accused is subject, in virtue of the warrant of arrest, to be taken as a fugitive from the justice of the state in which he is found to the state whose laws he is charged with violating.

7. One arrested and held as a fugitive from justice is entitled of right upon *habeas corpus* TO QUESTION THE LAWFULNESS OF HIS ARREST AND IMPRISONMENT, SHOWING BY COMPETENT EVIDENCE AS A GROUND FOR HIS RELEASE, THAT HE WAS NOT, WITHIN THE MEANING OF THE CONSTITUTION AND LAWS OF THE UNITED STATES, A FUGITIVE FROM THE JUSTICE OF THE DEMANDING STATE, THEREBY OVERCOMING THE PRESUMPTION TO THE CONTRARY ARISING FROM THE FACE OF AN EXTRADITION WARRANT."

The United States Circuit Court of Appeal in the Bruce-Rayner case has specifically held as above quoted that the Statute of Limitations and evidence thereon showing whether or not the statute has run, goes not to a matter of defense but purely to the question of whether or not a person is a fugitive from justice. Or, to put the matter in the language of the court itself, page 485:

> "IF, THEREFORE, IT SHOULD BE SHOWN THAT HE DID NOT CONCEAL HIMSELF WITHIN THE STATE DURING THE PERIOD WHICH HE WAS AMENABLE TO CRIMINAL PROCESS, THIS WOULD BE EVIDENCE TENDING TO ESTABLISH THE FACT THAT HE WAS NOT A FUGITIVE FROM JUSTICE. THIS TESTIMONY WOULD NOT GO TO THE SUFFICIENCY OF THE INDICTMENT OR TO ANY MANNER OF DEFENSE; IT WOULD BE DIRECTED SOLELY TO THE QUESTION WHETHER HE WAS A FUGITIVE FROM JUSTICE—A QUESTION OF FACT."

This, then, surely comes within the seventh rule laid down in McNichols v. Pease, *supra,* to-wit:

> "One arrested and held as a fugitive from justice is entitled of right, upon *habeas corpus,* to question the lawfulness of his arrest and imprisonment, *showing by competent evidence, as a ground for his release, that he was not, within the meaning of the Constitution and laws of the United States, a fugitive from the justice of the demanding state,* and thereby overcoming the presumption to the contrary arising from the face of an extradition warrant."

Wherefore appellant submits:

1. That the indictment does not, nor does any document in connection therewith "charge the appellant with a crime" against the laws of the state of Iowa, and therefore appellant should have been discharged from custody and his bail exonerated, and it should now be so ordered by this court.

2. In any event, the district judge erred in refusing to admit testimony showing that appellant was not a fugitive from justice from the state of Iowa, in this, that the appellant was, for more than three years after the commission of the alleged offense, publicly a resident within the state of Iowa, was during that time constantly in reach of all process of the state of Iowa, both civil and criminal, and prosecution upon said alleged offense was barred by the statute of limitations of the state of Iowa and hence appellant was not and could not be a fugitive from justice from said state.

In consequence, even in the event the court should hold that a crime was "charged," yet for the foregoing reasons the case should be remanded to the District Court with instructions to take the testimony proffered by appellant.

Respectfully submitted,

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